Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

(2)

No. 96-36

In The

Supreme Court of the United States

October Term, 1995

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioner,

vs.

ROBERT DALE HARRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT ROBERT DALE HARRISON IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SUSAN S. GARNER
(Counsel of Record)
ROBERT J. TURNER
TURNER LAW OFFICES, P.C.
Third Floor
208 Third Avenue North
Nashville, Tennessee 37201
615/259-2660

Attorneys for Respondent Robert Dale Harrison

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit construed a consent decree in a federal civil rights case in a way which violates the Fifth Amendment to the United States Constitution or applicable decisions of the United States Supreme Court by effectively modifying the terms of the decree, and holding Petitioner in contempt thereof.[1]

---

[1] Respondent notes that although Petitioner fails to include its Constitutional claim in its statement of the questions presented for review, Petitioner does in fact raise and argue the Constitutional claim in its Petition, and this issue should therefore properly be included in the questions presented for review.

TABLE OF CONTENTS

Page

Question Presented for Review..... i

Table of Citations..... iii

Statement of The Case..... 1

Reasons Why the Petition Should Be Denied..... 11

Conclusion..... 14

TABLE OF CITATIONS

Page

CASES CITED:

Rice v. Sioux City Memorial Parks Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955) 14

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 112 S. Ct. 748, 116 L.Ed. 2d 867 (1992)..... 13

United States v. Shubert, 348 U.S. 222, 75 S. Ct. 277, 99 L.Ed. 279 (1955) 13

CONSTITUTIONAL PROVISIONS:

Article III, Section 2 of the United States Constitution 12

Fifth Amendment to the United States Constitution..... i, 12

COURT RULES:

Supreme Court Rule 10 13

Supreme Court Rule 15 1

BRIEF OF RESPONDENT ROBERT DALE HARRISON IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Robert Dale Harrison ("Respondent") respectfully requests that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit submitted by the Petitioner Metropolitan Government of Nashville and Davidson County ("Metro").

STATEMENT OF THE CASE

Pursuant to Rule 15 of the Supreme Court Rules, Respondent submits this statement of the case to correct misstatements and omissions of material fact in the Petition which would be relevant to issues before the Court if certiorari were granted.

A. Metro's Harassment of and Retaliation Against Harrison

Respondent Harrison, who was 53 years old at the time of the District Court's 1994 hearing on the Petition for Contempt, is a Black or African American man who was originally hired by Metro to work in its Health Department in 1972. He originally filed suit for relief from race discrimination in 1980, complaining of Metro's failure to promote him while less qualified white employees were promoted, Metro's harassment and intimidation of him after he filed a Charge of Discrimination with the EEOC, and Metro's failure to provide him with training and equal employment opportunities.

After the District Court's entry of the Order of Judgment on May 17, 1982 with the consent of the parties (Appendix to the Petition at 68a), Harrison was returned to work. Immediately upon his return to employment, Harrison was subjected to hostility and excessive scrutiny of his work by Metro. A junior White employee, Kenneth Chambers, was assigned to ride with Harrison and watch him closely for anything Harrison might do incorrectly. A coworker testified that Harrison was watched to see if he "dotted his i's and crossed his t's".

Thereafter, Larry Cole became Harrison's supervisor. Witnesses testified that Cole exhibited a dominant, hostile attitude toward the Black employees under his supervision, even though Cole was himself Black. Cole referred to the Black employees as "niggers". He made threatening statements to Harrison and other black employees, including the statement that he would "run their assess away from there." Harrison and another employee witnessed Cole state to Billy Hendrixson, a white employee, that the White folks hadn't been able to get rid of Harrison, but that "it takes a nigger to get a nigger", and he believed he could get Harrison. In several different meetings, Cole told employees that Metro could afford to pay $20,000 to get rid of someone, in reference to the damages Metro had been required to pay Harrison at the time of his reinstatement. Cole ridiculed Harrison in front of his co-workers and criticized him unjustly.

Upon learning that Billy Hendrixson, who is White, displayed a Ku Klux Klan hood and badge to Harrison and Jeffrey Baker, another Black employee, Cole only laughed. Hendrixson admitted at the contempt hearing that he possessed Ku Klux Klan paraphernalia and that

he used a knife with Ku Klux Klan insignia openly at work. Cole testified at the contempt hearing that he did not take any action concerning the display of this and other Ku Klux Klan paraphernalia in the workplace, because he did not concern himself with "small things" like that. Both Harrison and Baker testified that they were shocked and upset by the sight of the Ku Klux Klan materials, and Harrison testified that it caused him stress.

Harrison and other Black employees protested Cole's harassing behavior to managers of the Health Department on many occasions, and even reported it in writing to the Mayor, but Metro took no action to halt the harassment. Although Fredia Wadley, M.D., the Director of the Health Department, admitted that Harrison reported to her that Cole referred to him as a nigger, no action was taken to provide Harrison with relief. Indeed, it was necessary for Harrison to file four EEOC Charges between 1982 and 1992 in an effort to obtain relief from Metro's retaliation and harassment.

B. Metro Failed to Train Robert Harrison and Other Black Employees as Ordered by the District Court

Between the entry of the Order of Judgment in 1982 and his discharge by the Health Department in November of 1992, Harrison was neither provided nor offered any training, except for a single euthanasia training from which he was excused for moral reasons. The written training record maintained by Metro establishes unequivocally that Harrison received no training after 1974. The training record of Black employee Robert Gibbs shows a

similar lack of training. In contrast, White employees who were junior to Harrison and Gibbs, including Billy Hendrixson, Victoria Maxwell and Kenneth Chambers, did receive training, including training as supervisors and animal control training, and were sent out of town to receive training and certificates.

Notice of training opportunities was not posted or provided to Harrison, and he learned of particular training programs only after the fact when White employees such as Hendrixson and Chambers talked about them afterward.

C. Metro Failed to Promote Harrison and Other Black Employees

Upon his reinstatement to work in 1982, Harrison learned that two junior White employees, Chambers and Ronald Cartwright, had already been promoted to Rabies Control Officer III positions. Prior to his reinstatement, Harrison's attorney had requested that he be given a Rabies Control Officer III position, but was told that no III position was available. However, Metro testified at the contempt hearing that it created a Rabies Control Officer II position for Harrison at his reinstatement. Harrison was never promoted to Rabies Control Officer III, despite the specific Order of the District Court that he be restored to all seniority and that he be trained for promotion to Rabies Control Officer III.

Metro's Civil Service Rules and Regulations require that job vacancies that will provide promotional opportunities be announced and advertised. However, promotional opportunities were neither posted nor made

known to Harrison and other Black employees between 1982 and the contempt hearing; rather, information concerning promotional opportunities was given by word of mouth only to those whom the Health Department wanted to know about the openings. Nevertheless, Harrison applied for positions superior to his on many occasions between 1982 and 1992, in case the positions were available but unknown to him. In 1984 and again in 1988, Harrison applied for the position of Rabies Control Officer III. In 1988, he applied for the open position of Rabies Control Manager. Metro conceded that Harrison was qualified for the position of Rabies Control Manager, and he scored well on the test for the position. Nevertheless, he was denied all of these positions. Other Black employees testified concerning numerous instances in which they had been denied promotional opportunities in favor of junior and less qualified White employees. In some cases, Black employees were denied promotional positions which were awarded to White individuals not previously employed by Metro, who had no experience whatsoever, in violation of the Civil Service Rule that promotions be made from within the Department whenever possible.

Cole admitted that he assigned supervisory responsibilities to every Senior Rabies Control Officer except Robert Harrison. Metro further assigned less desirable and more onerous job duties to Harrison and other Black employees than to junior White employees in the same job classification. Office work was primarily awarded to White employees, while Black employees were required to chase after dogs, pull dogs out from under houses,

bury dead and decomposed animals, and cut the heads off dogs so that they could be examined for rabies.

Neither Harrison nor Gibbs, the two most senior officers at the pound, were given offices at the pound during the period when they were allowed to work inside. Hendrixson and Chambers, both of whom are White and have less seniority than Harrison and Gibbs, had private offices at the pound.

D. Metro Provided Disparate and Less Favorable Pay and Benefits to Harrison and Other Black Employees

At the time of his discharge in 1992, Harrison was paid less than Hendrixson, Chambers, and Cartwright, all of whom were White and junior to Harrison in seniority. **All of the Senior Rabies Control officers were paid more than Harrison.**

Black employees testified to a disparity in the way sick leave was allowed to Black and White employees.

E. Harrison was Subjected to Disparate Adverse Disciplinary Treatment, and the Stated Reasons for his Discharge Were Pretextual

1. Harrison was Disciplined More Harshly than White Employees

Harrison received a number of spurious and unjust disciplinary charges between 1982 and 1992. White employees who engaged in the same or similar acts for

which Harrison was disciplined were either not disciplined at all or were disciplined less severely.

The Civil Service Rules and Regulations specify that progressive discipline, consisting of a written reprimand, suspension, demotion and dismissal in that order, be imposed for infractions of rules. However, in practice White employees were often just counseled privately by Cole, while Black employees were suspended.

In August of 1991, Harrison was suspended for six days for allegedly encouraging another employee, Jeffrey Baker, to leave his territory, and for picking up cats. Harrison had no supervisory authority over Baker and could not control Baker's actions. Baker had been disciplined for leaving his territory on an earlier occasion, but he was given a suspension, the same penalty imposed upon Harrison, who had never before been accused of the offense. Moreover, the proof showed that other employees who had repeatedly been out of their territory and had falsified records of their whereabouts were given only written reprimands for these offenses. Further, while Metro contended that Rabies Control Officers were not permitted to pick up cats, Harrison's written job description expressly stated that one of his duties was to pick up cats.

White employees who engaged in disciplinary infractions far more serious and repeated than any Harrison was accused of received more lenient discipline. Troy Kelly, a White employee of the pound, repeatedly came to work intoxicated with the knowledge of his supervisors, drove Metro vehicles while his driver's license was suspended due to DUI convictions, failed to show up for

work, failed to respond when called on the radio, used abusive language and threatened the public at Metro meetings, disrupted official meetings, failed to notify his supervisor of an accident which occurred while he drove a Metro vehicle, and had four accidents while on duty. He never received more than a written reprimand for any of these offenses.

Another White employee, Troy Kelly, had 12 motor vehicle accidents, some of which required Metro to pay for property damage, written reprimands for driving 85 miles per hour in a 55 mile per hour zone, for using profanity in a meeting, and both oral and written reprimands for repeatedly taking dogs home from the pound in violation of rules. Despite these numerous serious offenses, Rhodes never received anything more than a written reprimand.

Another White Health Department employee, Ed Watkins, was given only a written reprimand after his seventh accident in a Metro vehicle in six years. Willy Swafford, a White former pound employee, was found to have stolen significant amounts of money from the pound, but was not discharged. Instead he was allowed to resign with full retirement benefits.

2. The Reasons for Harrison's Discharge Were Pretextual

Metro put forth four purported justifications for discharging Harrison in November 1992. All of them are pretextual.

One of Metro's stated reasons for discharging Harrison was that he had had four motor vehicle accidents since 1988. Harrison had only five minor accidents in his twenty-year tenure with the Rabies Control Division, despite the fact that he spent ninety percent of his working hours on the road looking for dogs. Other similarly situated White employees had more accidents than Harrison, but were not discharged.

Metro's purported justification for discharging Harrison and not the White employees who had more accidents was that Cole had instituted a "clean slate" policy when he became Manager of the pound in 1988, and that only Harrison had four accidents after 1988. There is no authority for such a "clean slate" policy in the Civil Service Rules and Regulations, however, and in fact such a policy contravenes the progressive discipline policy contained in the Civil Service Rules. Moreover, Cole did not apply his "clean slate" policy uniformly. In a written memorandum in 1991, Cole admonished Rhodes for having seven accidents since 1984, citing accidents which had occurred before 1988 and the institution of the "clean slate" policy. Metro also attempted to justify Harrison's firing on the ground that other employees who had more accidents were not at fault in all of their accidents; the evidence showed that Harrison was not at fault in all of his accidents.

Metro's second purported reason for firing Harrison was that he allegedly failed to report an accident which occurred in 1992. However, Harrison immediately tried to call Cole when the accident occurred, and Cole being unavailable, left a message reporting the accident. Harrison later reported the accident to Cole in person on the

same day. Metro had no policy indicating how or when accidents were to be reported to one's supervisor.

Notably, White employees who failed to report accidents were not discharged or even disciplined significantly. Rhodes had several accidents which he did not report, but he was not disciplined at all. Troy Kelly had an accident which he did not report to either the police or his supervisor, and which he initially attempted to blame on Jeffrey Baker. When he finally admitted the accident, Kelly received only a written reprimand, rather than a discharge as Harrison did, for having failed to report the accident.

A third reason proferred by Metro for Harrison's discharge was that he allegedly failed to complete paperwork correctly. However, other employees made paperwork errors and were not discharged or disciplined in any way. Evidence of record indicates that all employees of the pound, including Manager Larry Cole, had numerous paperwork errors, and that in fact White employees Chambers and Hendrixson had far more errors than Harrison in the same time period. Harrison had significantly less experience than the comparable employees in working in the office, and had received no training in how to complete the required paperwork. When Robert Gibbs offered to train Harrison in how to complete the paperwork, Cole denied his request, and Cole also removed the chart of fees to be charged in the completion of forms from the office and hid it from Harrison. Cole himself could not properly calculate the fees without the chart at the hearing in this case. Although Harrison was accused of "blacking out" information on receipts, he did not do so, and the initials of

other employees appear on some of the receipts Harrison was accused of blacking out.

A fourth reason proferred by Metro for Harrison's discharge was that he was allegedly rude to the public. Harrison had never before been accused of being rude in his twenty year history with Metro, and in fact in January of 1992 had been rated "above standard" for his relationship with the public in his performance evaluation. An eye witness testified that Harrison had been polite during the incident in question, and had addressed the customer as "sir". Indeed, the Metro Board of Health determined after a hearing that Harrison had not been rude to the public.

Respondent notes that Metro refers in its Petition to a pre-1992 discharge of Harrison for allegedly falsifying doctor's appointment slips. Although no evidence was introduced by Metro at the contempt hearing to support this accusation, Harrison denied having falsified any document, and his discharge on this ground was overturned by the Metro Board of Health.

REASONS WHY THE PETITION SHOULD BE DENIED

A. This Court has no Jurisdiction to Hear the Constitutional Claim raised by Petitioner for the First Time in This Court

Petitioner Metro seeks to have this Court grant a writ of certiorari to adjudicate a Constitutional claim which Metro raises for the first time in this Court. Specifically, Metro argues that the District Court and the Court of

Appeals applied the 1982 Order of Judgment in such a way as to violate Metro's right to due process under the Fifth Amendment to the United States Constitution. However, Metro failed to raise this issue before the Sixth Circuit either in its appeal or in a Petition for Rehearing. No Constitutional claim has been briefed or argued at any time by Metro below, nor did the Sixth Circuit Court of Appeals consider or decide a Constitutional claim.

The United States Supreme Court is not a Court of original jurisdiction, except in cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." Article III, Section 2 of the United States Constitution. In all other cases, the Supreme Court has appellate jurisdiction, under such laws as the Congress shall make. Article III, Section 2 of the United States Constitution. Therefore, Respondent respectfully submits that this Court is without jurisdiction to entertain Petitioner's newly-raised Constitutional claims, and the Petition for Certiorari should accordingly be denied.

B. Petitioner's Argument that the Courts Below Erred in Interpreting or Applying the Order of Judgment Raises No Important Question Justifying Review by the Supreme Court.

Metro argues, in essence, that the District Court and the Sixth Circuit Court of Appeals made factual or legal errors by "rewriting" the Order of Judgment.[2] Even if this

---

[2] Respondent disputes that the Courts did so, and submits that the decisions of both the District Court and the Court of

were true, such errors do not bring this case within the parameters for the exercise of Supreme Court jurisdiction contemplated by Rule 10 of the Rules of this Court.

As Metro concedes at Page 10 of its Petition, "established procedure [sic] and criteria exist for reviewing consent decrees and modifying them in light of changed circumstances. *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992)". Metro then argues that the Courts below did not follow those established criteria. This argument, even if valid, presents no special and important reasons supporting the issuance of a writ of certiorari by this Court. *See* Supreme Court Rule 10. Metro's Petition does not present a significant or important legal question, but rather concerns the application of established law to the evidence of record in this case. Metro's argument is merely a thinly-disguised attempt to have this Court second-guess the findings of the Courts below, and as such does not merit the grant of a writ of certiorari. *United States v. Shubert,* 348 U.S. 222, 229, n. 1, 75 S. Ct. 277, 99 L.Ed. 279 (1955). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[3] Supreme Court Rule 10.

Appeals were fully supported by the evidence of record and by the law.

[3] Notably, Metro omits this portion of the Rule when it quotes Supreme Court Rule 10 in its Petition for Certiorari.

C. Decision of the Issue Raised by Metro Would be of Little Public Importance or Precedential Value.

Because Metro's contention is in reality that the Courts below made erroneous factual findings or misapplied established law, any decision which this Court might render would have little precedential effect or practical value. Consideration of this issue would serve an important purpose only for the parties to this litigation. Accordingly, this case does not warrant the expenditure of this Court's limited time and resources. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955).

CONCLUSION

For the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SUSAN S. GARNER
(Counsel of Record)
ROBERT J. TURNER
TURNER LAW OFFICES, P.C.
Third Floor
208 Third Avenue North
Nashville, Tennessee 37201
615/259-2660

Attorneys for Respondent
Robert Dale Harrison